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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM OF 1972

72-587

HOLLAND-AMERICA LINE,

Petitioner,

—v.—

FOREIGN STUDY LEAGUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitution and Statutes Involved	2
Statement of Case	3
Reasons for Granting the Writ	5
1. THE DECISION OF THE LOWER COURT HAS VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND SERIOUSLY ERODES THE BARRIERS AGAINST EXCESSIVE ASSERTION OF PERSONAL JURISDICTION	5
2. THE UTAH SUPREME COURT HAS INCORRECTLY APPLIED THIS COURT'S DECISION IN *INTERNATIONAL SHOE COMPANY* V. *WASHINGTON*, 326 U.S. 310	7
Conclusion	10
Certificate of Service	11
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1
Appendix D	D-1
Appendix E	E-1

Index of Authorities

PAGE

Anderson v. *Matson Navigation Co.* (D. Minn. 1971), 336 F. Supp. 1388 8

Hanson v. *Denckla*, 357 U.S. 235 (1958) 6,7

International Shoe Company v. *Washington*, 326 U.S. 310 (1945) 2, 5, 8

McGee v. *International Life Insurance Company*, 355 U.S. 220 (1957) 5

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963) 9

Rosenblatt v. *American Cyanamid Co.*, 86 S. Ct. 1, 15 L.Ed. 2d 39 (1965) 9

Constitution

United States Constitution
Amendment XIV, Section 1 ..... 2, D-1

Statute

Laws of Utah, 1969, ch. 246 ..... 2, 6, 8, E-1

Secs. 1-7; Title 78-27-22 et seq., Utah Code Annotated

28 U.S.C. § 1257 ..... 1, 9

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Opinions Below

The opinion of the Supreme Court of the State of Utah is reported at 497 P.2d 244, but not yet officially reported; the Order of the Third Judicial District Court In and For Salt Lake County was not officially reported. The Opinions and Orders of the lower courts are set forth in Appendices A, B and C hereto.

Jurisdiction

The opinion of the Court below was entered on May 15, 1972, and petition for rehearing denied on July 14, 1972.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented

Whether the Court below erred in holding that the petitioner "did business" in Utah "under the letter and spirit" of *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945).

Whether the Court below erred in failing to distinguish between the two concepts of "doing business" and a "transaction of business" from which an actionable claim could arise, under Utah's "long-arm" statute, Laws of Utah, 1969, ch. 246, Title 78-27-22, Utah Code Annotated.

Whether the facts alleged to confer jurisdiction over the petitioner were sufficient to meet the minimum standards allowed by the Due Process Clause of the United States Constitution, Amend. XIV, § 1

Constitution and Statutes Involved

The relevant provision of the United States Constitution in this suit is Amendment XIV, Section 1. The relevant statutory provisions are the Utah "long-arm" statute, Laws of Utah 1969, ch. 246, Secs. 1-7, Title 78-27-22 *et seq.,* Utah Code Annotated, Vol. 9, 1971 Pocket Supplement, p. 44. These provisions are set forth in Appendix D.

This Petition seeks review of a judgment of the Supreme Court of the State of Utah, filed May 15, 1972, reversing (two judges dissenting) a Judgment and Order of the District Court the District of Salt Lake, in and for Salt Lake County, based upon the provisions of Utah's "long-arm" statute extending jurisdiction of that state's courts over nonresidents, and this Court's decision in *International Shoe Co.* v. *Washington,* 326 U.S. 310.

Statement of Case

The petitioner, Holland-America Line, hereinafter referred to as "HAL", is a Netherlands steamship company engaged in furnishing passenger and cargo services on various ocean trade routes, principally on the North Atlantic ocean. The respondent, Foreign Study League, hereinafter referred to as "FSL", is incorporated in Utah and promotes overseas tours at group rates. During 1969, respondent FSL engaged in negotiations with petitioner HAL to charter petitioner's passenger vessel, S.S. RYNDAM, for the summer of 1970. A dispute arose as to whether such negotiations had resulted in an enforceable contract and if so, whether FSL was in breach thereof. FSL commenced a suit for a declaratory judgment in the District Court of the Third Judicial District for Salt Lake County, Utah on April 10, 1970. A copy of the summons and complaint was mailed to HAL in Rotterdam, the Netherlands, and another copy was delivered to HAL's New York office by a Deputy Sheriff of New York City.

HAL moved to dismiss the complaint for lack of *in personam* jurisdiction. HAL has a suit pending against FSL in the United States District Court for the Southern District of New York for breach of contract, which arises out of the identical facts as are involved in this suit.

Three possible bases for jurisdiction of the petitioner were claimed by respondent FSL and dealt with in the lower courts:

(1) It was claimed that petitioner was "present" in Utah because travel agents in that state, together with 6000 others throughout the United States, are parties

to sub-agency appointment contracts with the Trans-Atlantic Passenger Conference. While petitioner and many of its competitors are members of the conference, it has signed no agreement with any Utah agents, maintains no office or property and does not advertise within the state. Over a period of years, certain HAL personnel have visited Utah, but have not engaged in efforts to solicit business, nor have the local travel agents sought customers on its behalf [105-117a].*

(2) On March 31, 1969 and January 17, 1970, Johannes Tuinman, Jan Boeren and Jos Vos, HAL employees, paid business visits to respondent at Salt Lake City, the first meeting concerning a possible use of the RYNDAM unconnected with FSL's Utah action and the second at FSL's summons, concededly only for the purpose of announcing to HAL that it would not utilize the RYNDAM for the period covered by the charter [80, 126a]. Prior to the January meeting, however, the respondent sent part payment to the petitioner for charter hire of the RYNDAM and published an extensive brochure, dealing with the charter from which this claim arose.

(3) Before March 31, 1969, Tuinman made three or four visits to Wilhelmus Touw of FSL, who had once been a colleague of his at HAL, which may at most have involved some general discussion of common personal business interests [30-34a].

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* Page numbers ending in "a" refer to the transcript of the Hearing Record before the District Court In and For Salt Lake County constituting a part of the record below, to be certified and transmitted to this Court by the Clerk of the Supreme Court of Utah.

The District Court for Salt Lake County granted HAL's motion to quash service of the summons, primarily on the ground that HAL's jurisdictional contacts with Utah were insufficient to satisfy the requirements of *International Shoe Company* v. *Washington,* 326 U.S. 310, and *McGee* v. *International Life Insurance Company,* 355 U.S. 220 (1957). The Supreme Court of Utah reversed the District Court's decision, two of the five Justices dissenting [Appendix B]. The Court found that HAL "did business" in Utah "under the letter and spirit" of *International Shoe, supra,* as well as Utah's "long-arm" statute [Appendix E].

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE LOWER COURT HAS VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND SERIOUSLY ERODES THE BARRIERS AGAINST EXCESSIVE ASSERTION OF PERSONAL JURISDICTION.

The extent to which a "long-arm" statute can be applied to dilute the minimal contacts necessary to confer jurisdiction over a nonresident without deprivation of due process "is important not only to [Utah], but to other states which have similar laws." *McGee* v. *International Life Insurance Co.,* 355 U.S. 220, 221.

The phrases "minimum contacts", used in relation to "doing business", and "certain significant minimal contacts" as applicable to jurisdiction over a nonresident arising from an act done within the forum state, are not "synonymous". While jurisdiction based on the presence of a nonresident is not limited to a cause of action arising from

such contacts, the "long-arm" acts enacted in Utah and many sister states confer jurisdiction only with respect to causes of action arising "through certain significant minimal contacts with this state", Title 78-27-22, Utah Code Annotated.

The Supreme Court of Utah held that there was "a 'doing business' in Utah under the Act that justified the local court's exercising jurisdiction without aborting the due process concept" [Appendix B, at pages B-5 and B-6], 497 P.2d at 246. It concluded that jurisdiction arising under Utah's "long-arm" statute, and that based upon "doing business", were "synonymous". As a result, the Court created a new concept, in which jurisdiction would appear to exist over a nonresident where there are insufficient contacts with the forum state (*none* of which give rise to the cause of action) to constitute "doing business", merely because a "long-arm" statute exists. The Court therefore incorrectly applied Utah's long-arm statute to confer jurisdiction over a nonresident in a cause of action that did *not* arise from a specified act done within the state.

Regardless of any factual errors that the Utah Supreme Court may have made, the application of the statute to isolated and sporadic Utah contacts insufficient to constitute "doing business" under *International Shoe,* and from which no claim arose, as demonstrated in the second, third, fifth and ninth paragraphs of the majority's opinion, goes far beyond the appropriate principles framed by this Court. *Hanson* v. *Denckla,* 357 U.S. 235 (1958).

Here, the Utah Court, by extending the scope of the "long-arm" statute and combining the disputed contacts in what it considered a sufficient jurisdictional quantity, has pronounced the territorial limits of state jurisdiction

to be virtually inconsequential. In 1958, this Court took care to note that despite expansion of the basis for exercise of personal jurisdiction over nonresidents, it was incorrect "to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of the state courts." *Hanson* v. *Denckla, supra,* at p. 251. The basis upon which jurisdiction is found to exist must be fair and reasonable, taking into account the contacts of the absent defendant with the state, in light of the state's need and interest in providing a local forum.

2. THE UTAH SUPREME COURT HAS INCORRECTLY APPLIED THIS COURT'S DECISION IN *INTERNATIONAL SHOE COMPANY* v. *WASHINGTON*, 326 U.S. 310.

The majority below, while indicating that the presence in Utah of independent travel agents selling petitioner's product did not constitute "doing business" within the State, 497 P.2d at 247, Appendix B at page B-6, holds that "more contacts", added to the presence of the independent contractors, in the instant case, provide a basis for a finding of "'doing business' *in the statutory and constitutional connotations of that phrase*", 497 P.2d at 247, Appendix B at page B-7 [emphasis added]. Thus, all of Tuinman's visits to Salt Lake City are consolidated in the majority's view, and not considered separately in relation to the two available bases for jurisdiction. Tuinman's visits prior to that of March 31, 1969, as an individual, were social in nature and had virtually nothing to do with petitioner's business [39-41a]. By labelling them "contacts" and combining them with the two conceded business trips of peti-

tioner's personnel on March 31, 1969 and January 17, 1970 —neither of which constituted a transaction of business from which this claim arose, for the purpose of jurisdiction under U.C.A. Title 78-27-24 (1)—the lower court has incorrectly concluded that the language of this Court in *International Shoe*, defining "minimum contacts" (326 U.S. at 316), because it gave rise to the oft used "minimal contacts" found in the Utah Statute, among others, meant that such "long-arm" jurisdiction arising from a single act could be applied to "contacts" that did *not* give rise to a cause of action in Utah. Thus the Court concluded that "the defendant did business here under the letter and spirit of the Shoe case . . . and our Long Arm Statute", 497 P.2d at 246, Appendix B, at page B-5.

The lower court took note of income derived by the petitioner from Utah sources. No part of this was obtained from solicitation by HAL, but resulted rather from the use of its vessels by Utah residents outside of the state. Most if not all of it in fact was generated by independent travel agents in the state.

No other court appears to have held a foreign carrier to be "doing business" on the basis of activities of independent travel agents within the forum state. On the contrary, another passenger steamship company was held not to be doing such business where an independent agency of the Transpacific Passenger Conference handled reservations and tickets through local travel agents, and the steamship company, in addition, carried the cargo of some 40 Minnesota shippers. *Anderson* v. *Matson Navigation Co.* (D. Minn. 1971), 336 F. Supp. 1388, at 1390.

While this petition does not rest upon alleged errors of fact in the lower court, there is no evidence in the record

that petitioner HAL's prior dealings with FSL constituted "doing business" in Utah; indeed, FSL is a national corporation licensed to do business in many states. HAL had no field agents in Utah, and the Trans-Atlantic Passenger Conference, characterized by the Utah Supreme Court as "defendant's front institution", has no such relationship as a business representative or agent of the petitioner [106-117a]. HAL is only one of many members of the Steamship Conference; the travel agents never received instructions or supervision from HAL [106, 111a]; the travel agents did not solicit business for any particular steamship company [105a], and HAL never requested that they solicit business [111a]. By erroneously construing a state statute, and extending the reach of Utah's "long-arm" statute beyond its permissible limits, the Court below has violated the petitioner's constitutional right to due process of law. The issue, separate and independent from the merits of FSL's suit, is ripe for adjudication now; postponement of this petition until a final disposition of the Utah action would not "serve the policy underlying the requirement of finality in 28 U.S.C. § 1257." *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963); *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1, 3, 15 L.Ed.2d 39, 43 (1965) [hearing in chambers].

Unless the constitutional limits of due process are applied, the most ephemeral jurisdictional "contacts" will be used to impose the burden and expense of defense of this, and other such cases, in a distant state.

CONCLUSION

This Court has never ruled on the extent to which modern "long-arm" statutes may be used to confer jurisdiction over an out-of-state defendant. Whether that defendant is a natural person or a corporation, it should not be subject to control in a forum with which it has a vestigial or non-existent relationship. The misuse of "long-arm" statutes by litigants is a question of paramount federal concern, going far beyond considerations of fairness, to the encouragement of forum-shopping, restrictions on interstate transactions, multi-state suits, expense and hardship to defendants and unnecessary litigation. More than half of the states now have such statutes. This Court should grant the Writ to prevent the frustration of uniformity of our laws, and to guarantee a constitutional jurisdictional standard to all defendants.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

By .....
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Certificate of Service

I, FRANK L. WISWALL, JR., Attorney for Petitioner Holland-America Line, do hereby certify that on this, the ..... day of October, 1972, a copy of the foregoing Petition for a Writ of Certiorari has been served on the following:

MR. DANIEL BERMAN
1010 Kearns Building
Salt Lake City, Utah 84101

Attorney of record for the Respondent, by mailing the same to him through the United States mail, postage prepaid.

.....
FRANK L. WISWALL, JR.

APPENDICES

APPENDICES

APPENDIX A

MEMORANDUM DECISION GRANTING DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS

IN THE

DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Civil No. 192884

FOREIGN STUDY LEAGUE, a Utah corporation,

Plaintiff,

vs.

HOLLAND-AMERICAN LINE,

Defendant.

The above-entitled case is before the court upon defendant's motion to quash the service of summons and to dismiss the complaint for lack of jurisdiction. The motion came on for hearing on December 10, 1970, with Daniel L. Berman appearing as counsel for plaintiff and Albert R. Bowen and John S. Rogers (of New York City) appearing as counsel for defendant. Testimony was heard and exhibits were received and the motion was taken under advisement pending the filing of briefs and reply briefs by the parties. The court has now considered the matter and renders its decision on said motion.

The plaintiff, by its complaint, seeks to have this court enter a declaratory judgment that no valid, binding contract

exists between it and the defendant for the use of defendant's ship SS Ryndam for the summer of 1970. In additional multiple counts, plaintiff seeks a determination by this court that if the court rules adversely to plaintiff upon its claim that no contract exists, that the court then rule that said contract is void as being vague, illusory, contrary to public policy, and if not void, that it be adjudged that no damages are owed by plaintiff to defendant, or that damages be fixed in certain maximum amounts. Plaintiff also seeks costs against defendant.

Plaintiff is a Utah corporation engaged in the business of promoting study by students in foreign lands. Defendant is a foreign steamship company with its home offices in Holland and its main office in the United States being located in New York City. It does not maintain an office in the State of Utah, but plaintiff claims that defendant is subject to the jurisdiction of Utah courts based upon the following allegations:

(1) That the defendant is doing business within the State of Utah by reason of the appointment of 19 travel agencies within the State of Utah as sub-agents of the Trans-Atlantic Passenger Steamship Conference, of which Conference defendant is a member.

(2) That the negotiations carried on between plaintiff and defendant with respect to the use of the SS Ryndam were conducted partially in Utah and constituted doing business in the State of Utah.

(3) That under the provisions of Title 78, Chapter 27, Utah Code Annotated, as amended in 1969, defendant is subject to the jurisdiction of this court.

As to (1), travel agencies in the State of Utah receive sub-agency appointments by means of an agreement between the travel agency and the secretary of the Trans-Atlantic Passenger Steamship Conference, acting as agent for all of the member lines of the Conference. Standards and regulations issued by the Conference control travel sales by the sub-agents and authorize such sub-agents to sell accommodations on ships operated by the various members of the Conference, subject to prior approval for such accommodations by the member lines.

Plaintiff contends that the appointment of local travel agencies in Utah as sub-agents, and the resulting sales of passenger accommodations on defendant's passenger ships constitutes "doing business in" the State of Utah in the traditional constitutional sense so as to render defendant subject to the jurisdiction of this court for the purpose of its declaratory judgment action. If this be a valid contention, it means that every member of the Trans-Atlantic Passenger Steamship Conference is subject to the jurisdiction of every state court in which states such sub-agency appointments have been made. (Based upon testimony, this would include every state in the union.)

Under the Business Corporation Act, of this State (Title 16, Chapter 10, UCA 1953) and particularly Section 16-10-102, it is provided that a foreign corporation shall not be considered to be transacting business in this state, for the purposes of the act, by reason of carrying on in this state any one or more of several enumerated activities, included among which are (1) effecting sales through independent contractors, (2) soliciting or procuring orders through agents or otherwise where such orders require acceptance without this state before becoming binding contracts, and (3) transacting any business in interstate commerce.

In my opinion, these statutory provisions are applicable in determining whether or not a foreign corporation is transacting business in the traditional sense of "doing business in" the State so as to confer jurisdiction over the foreign corporation within the courts of this state. Any one or more of the activities set out above may be descriptive of the activities of Utah's travel agencies under the sub-agency appointment agreements of the said Conference. Without attempting to summarize all of the testimony and evidence touching upon this matter, it is my conclusion that the sub-agency appointment agreements between the Conference and the travel agencies of this state do not constitute "doing business in" the State of Utah so as to subject defendant as a member of that conference to the jurisdiction of this court for that "certain significant minimal contacts with this state" were had which were sufficient to meet minimum requirements of the due process clause of the 14th Amendment.

The act provides that any person or corporation who in person or through an agent does any of the enumerated acts set forth in Section 78-27-24 submits himself to the jurisdiction of the courts of this state *as to any claim arising from any such enumerated acts.* Included in such enumerated acts are the following acts relied upon by plaintiff:

(a) Contracting to supply services or goods in this state.

(b) The transaction of any business within this state.

In my opinion (a) and (b) each relate to different acts, and (a) would not be included in (b) unless the contract-

ing was done under circumstances that constitute transacting business within the state as that term is defined in the statute. In other words, (a) relates to supplying goods or services to parties in the State of Utah, regardless of where the contract is executed. The agreement, if any, which plaintiff seeks to have this court declare does not exist, involves supplying services on the Atlantic Ocean, not in Utah, and thus I do not believe that a category (a) act is involved in this case.

We thus must consider the category (b) act. By statute the words "transaction of any business within this state" means activities of a non-resident (or its agents) in this state which affect persons or businesses within the State of Utah. 78-27-23(2)). From this, it seems apparent that there must be some activities by the non-resident which take place within the state, which affect persons or businesses within the state, which are of a sufficient nature as to meet minimum requirements of "due process," and by which the non-resident incurs obligations to a citizen entitled to the state's protection. Clearly, if the activities of a non-resident within the state were such as to result in a non-resident incurring an obligation to a citizen of this state, such activities would "affect" persons or businesses within the state. Conceivably, one single act by a non-resident in the state may be sufficient for that non-resident to incur an obligation to a citizen. Whether it alone would be sufficient to meet the "due process" requirements is another matter. On the other hand if such activities result in no obligation being incurred by the non-resident to the citizen, it would appear that it could not be said that such activities affected a person or business in this state. Thus, what plaintiff apparently contends is that defendant's activities in the state did not result in any obligation being

incurred, but that such activities were sufficient to meet the due process requirements of the Fourteenth Amendment so as to enable this court to take jurisdiction and so declare. In this regard, it must also be remembered that under Section 78-27-24 a non-resident who transacts any business within this state does not submit himself to the jurisdiction of the courts of this state for all purposes, but does so only as to "any claim arising from" the transaction of any business within this state. Does a claim that no "claim" exists meet the requirements of the statute, or of due process under the constitution? The plaintiff does not claim that through certain significant minimal contacts with this state, the defendant incurred obligations to it as a citizen of this state. What plaintiff asserts is that it has incurred no obligation to defendant; or that if it did incur an obligation to defendant, that obligation is void for various reasons; or that if not void, plaintiff is not indebted to defendant; or if indebted, it is only in certain minimal amounts. In fact, the only "obligation" which plaintiff claims is due it from defendant is "costs" in the action filed. Is the "long-arm" statute to be so used?

We are, in any event, led into a consideration of the fullest extent to which jurisdiction over a non-resident defendant in such a case is permitted by the due process clause of the Fourteenth Amendment. In support of its contention that defendant's contacts have been sufficient to meet due process requirements, plaintiff cites McGee v. International Life Ins. Co., 355 U.S. 220, 2 L. Ed. 2d 223 as predicating in personam jurisdiction upon a single act transaction. But jurisdiction in McGee was predicated upon the existence of an enforceable, valid, insurance policy upon the life of a California resident, rather than

"minimal contacts," and a finding by the Supreme Court that in such a case, to deny jurisdiction to the California court to entertain a claim on the policy would be a severe hardship on the beneficiary and would, in effect, render the insurance company "judgment proof." The court in McGee did recognize a "discernible" trend toward "expanding the permissible scope of state jurisdiction over foreign corporation," and cited International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, in which case the Supreme Court said:

> "... due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

In an effort to further explain such "traditional notions" the court also says, among other things, the following:

> "For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. ... Those demands may be met by such contacts ... with the state ... *as make it reasonable* ... to require the corporation to defend the particular suit which is brought there." (Emphasis mine.)
>
> * * * * *
>
> "... other such acts (single or occasional), because of their nature and quality and the circumstances of their commission may be deemed sufficient to render the corporation liable to suit."
>
> * * * * *

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subject of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely . . . whether the activity . . . is a little more or a little less." (Cases cited) "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. . . ."

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought *to enforce them* can, in most instances, hardly be said to be undue."

Whether these statements by the court clarify the meaning of "due process," or the "fullest extent permitted" thereby, or "of traditional notions of fair play and substantial justice," may be open to question. Perhaps the most that can be said is that the person who is called upon to make a jurisdictional decision may get some inspiration therefrom which enables him to say—when applied to the facts of a particular case, albeit uncertain—"yes" or "no" to the question of whether a court has jurisdiction.

In the case at bar, the plaintiff relies upon two visits to Utah by agents of defendant as constituting the "signifi-

cant minimal contacts" to give this court jurisdiction under the statute and the due process clause. One was on March 31, 1969, which was before the effective date of the long-arm statute in question, and the other in January, 1970, upon which occasion defendant's agents were requested to come to Utah by plaintiff's agents without disclosing to defendant's agents, and intentionally so, that the purpose of the requested visit was to advise defendant that plaintiff would not use the Ryndam in 1970.

The minutes of the March 31, 1969 meeting (Ex 3-d) the letter from plaintiff to defendant of April 11, 1969 (Ex 5-D) and the exchange of telegrams of May 5, 1969 (Exs 6-D and 7-D) reflect that the New York to Southampton/LeHavre/Rotterdam sailings and the African Cruise discussed at the March 31 meeting were not consummated into an agreement for 1970, but rather it was proposed that they apply to a 1971 agreement, and in lieu thereof, that the parties negotiated for an agreement concerning Boston to Southampton or Cherbourg (and return) sailings, a proposal that appears to have been first made by Touw to Boeren in a telephone conversation held on April 9, 1969, and made the subject of the exchange of telegrams on May 5, 1969. It is clear that the proposals discussed, as reflected in the minutes, at the March 31, 1969 meeting, were not reduced to a contract for 1970 on use of the Ryndam and plaintiff claims that subsequent negotiations resulted in no contract being effected. Whether that claim is valid is a question not before this court for decision. The question is whether or not the record reflects certain significant minimal contacts by which a non-resident incurred obligations to citizens of this state and which can be said to be sufficient to give jurisdiction over the non-resident within

permissible limits allowed by the due process clause of the Fourteenth Amendment. In order for activities of a non-resident to "affect" persons or businesses in this state, so as to constitute the "transaction of business within this state" under Section 78-27-23(2) it seems to me that the term "affect" must get its meaning from the "incur obligations to citizens" phrase of Sec. 78-27-22. Even if obligations are incurred, we must still find the activities or contacts to be sufficient to meet the minimal requirements of due process. The test seems to be whether or not the activities were such as to "make it reasonable" to require the corporation to defend.

Plaintiff's position must be that the meeting of March 31, 1969, constitutes sufficient activities of defendant to make it reasonable to require defendant to appear and defend plaintiff's claim that the activities resulted in no obligation being incurred and no claim arising therefrom, etc. I find it difficult to find it reasonable to so require. I am not at all impressed with plaintiff's contention that the January, 1970, meeting strengthens its position.

The "activities" of the March 31, 1969, meeting were, at most, one part of the negotiations between the parties, and even if the Boston sailings were discussed at that meeting, in order for me to find that "obligations" were incurred or that a "claim" arose therefrom, it would require me to first find that a contract exists which is what plaintiff most earnestly and completely denies.

It seems unreasonable to me to require, based upon such limited activities as are here present, that a non-resident appear in the courts of this state and defend a contention by a citizen that *no* obligation was incurred and that *no* claim arose, as a consequence of those limited activities.

I do not believe that "long-arm" statutes should have a retroactive reach and since the March 31, 1969, meeting occurred before the effective date of the 1969 legislation, a conclusion that jurisdiction over defendant exists as a consequence of such meeting would, in my opinion, offend even more the minimum requirements of the due process clause of the Fourteenth Amendment.

It is therefore, my conclusion that the activities of the defendant in this state were not sufficient to meet minimal requirements of the due process clause and the defendant's motion to quash the service of summons should be granted.

It is so ordered.

DATED this 2nd day of March, 1971.

BRYANT H. CROFT
Judge

APPENDIX B

IN THE

SUPREME COURT OF UTAH

FOREIGN STUDY LEAGUE, a Utah corporation,

Plaintiff and Appellant,

v.

HOLLAND-AMERICA LINE,

Defendant and Respondent.

No. 12445.

Supreme Court of Utah.

May 15, 1972.

HENRIOD, Justice:

Appeal from an order quashing service of process in an action instituted under the Utah Declaratory Judgment Act (Title 78-33, Utah Code Annotated 1953). Reversed and remanded for further proceedings consonant with this decision, with costs to plaintiff.

The question here, that of whether a nonresident is doing business in the state is strictly a factual one, and each case, therefore, must be determined on its own peculiar and significant facts[1] to determine if the local forum has jurisdic-

[1] McGriff v. Chas. Antell, 123 Utah 166, 256 P.2d 703 (1953).

tion to try and adjudge the claims or obligations of one domiciled elsewhere. The rule leading to a conclusion that such nonresident constitutionally must subject himself or itself to the jurisdiction of our courts, is one of reason,—which is only an alternate way of saying that the minimum guarantees of due process must be afforded, else our courts are without authority to bind or grant relief to the nonresident. This concept is embraced within the prefatory language of our so-called Long Arm Statute[2] which says the act "should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution,"—to provide "an effective means of redress against nonresident persons, who through certain *significant minimal contacts* with this state, incur obligations to citizens entitled to the state's protection." It appears almost obvious that this language was prompted by International Shoe v. Washington,[3] which used the word "minimum" contacts rather than "minimal" contacts employed in our act,—which language seems to be synonymous, but motivated by our use of "minimal" in our case of Hill v. Zale.[4]

Since these cases are strictly factual and dispositive by the application of case and statutory law to the fact situation presented in the instant case, there seems to be merit in recalling the facts and conclusions in the Shoe and Zale cases (upon which our act seems to be founded), in some kind of qualitative and/or quantitative analytical compari-

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[2] Title 78-27-22, Utah Code Annotated 1953 (Laws of Utah 1969, ch. 246, sec. 1; Vol. 9, 1971 Pocket Supplement, p. 44).

[3] 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

[4] 25 Utah 2d 357, 482 P.2d 332 (1971).

son with those in the instant case for a solution of the problem by this tribunal.

In the Shoe case,—one involving contributions by employers to a workmen's compensation fund, the Shoe Company, domiciled in St. Louis, had no place of business or office in Washington State, no contracts of sale there, no stock of merchandise there, but employed resident salesmen there. They worked on commissions, carried samples and occasionally rented sample rooms paid for from St. Louis. They sent their orders to St. Louis for acceptance or rejection, and if accepted the shoes were shipped from the Missouri city to buyers in Washington. The salesmen had no authority to enter into contracts or make collections. The United States Supreme Court said that Constitution-wise this was doing business in Washington warranting the invocation of jurisdiction there to determine controversies between Washingtonians buying footwear there from lasts abroad.

In the Zale case plaintiff Hill, who claimed wages earned in Alaska as employee of Zale, a Texas corporation, sought recovery in Utah, asserting that Zale was "doing business" in Utah. Zale was a jewelry outfit for whom Hill had worked in Utah. It had stores in a number of states,—several of which in Utah were subsidiarized and subsidized by separate corporations officered by identical gentlemen. The advertising, collections and auditing functions funneled in and out of the subsidiaries and their defendant parent, that paid the salaries of all employees. Ostensibly, Zale of Texas, was phantom in Utah. Nonetheless, we had little or no difficulty in holding that it was mundane enough to have used Utah in such fashion as to conclude that the hand it extended here for profit equally was capable of effectively accepting service of process.

Now, as to the facts in our instant case: It is believed and submitted that the evidence adduced under the discovery process, substantially and without serious contradiction, accurately may be abstracted thus:

Plaintiff is a Utah corporation which, among other things, charters ships for educational purposes, visiting foreign lands. Defendant on its ship accommodates such travel for a fixed fee. It has offices principally in Rotterdam, but also in New York, San Francisco, Los Angeles and other likely ports of call. Most of the evidence in and out of the inordinately protracted transcript here, flows from the frank responses of two top officials of the Holland-America sail and sales maritime operations. The interpretations of their frankness by the litigants here understandably are poles apart.

Tuinman, a top and authoritative representative of defendant says: That he resides in New York, is general sales manager for defendant; that he markets defendant's passenger service in the United States, amounting to about forty million dollars per year, including charter service, in which area the plaintiff was by far its chief customer in 1968-69, and out of which a roughly estimated gross of $600,000 was realized from the Utah-based corporation's relations with defendant,—and in which sales effort he had a close connection; that his company's operations were fostered by field agents, also through about 18 or 19 travel agents in Utah who were authorized through defendant's front institution Trans-Atlantic Passenger Conference, by written agency contracts, ratified by, subscribed to and authorized by defendant, to display in Utah the defendant's literature, "sell bookings" on its behalf, and receive commissions for accepted bookings; that defendant's repre-

sentatives call on them personally (in Utah), encourage them to sell defendant's space on the ship; that defendant has field agents that do about the same thing; that Mr. Tuinman knew Mr. Touw who used to work for the Holland Company, but now for plaintiff, who was responsible for the first college cruise contract between plaintiff and defendant; that Mr. Tuinman, because of his friendship for Touw, made combined social *and* business calls on the latter in Utah; that he called in March 1969 and in January 1970, meeting with Touw and plaintiff's attorney with respect to a contract to employ a ship for a foreign trip; that one trip for a college was completed through plaintiff in 1969; that talks took place in Utah, New York and Rotterdam; that business was always discussed on such occasions; that in 1968 and 1969, with respect to the ship Ryndam, plaintiff was defendant's principal customer; that there were correspondence, telegrams and telephone calls with respect to chartering the Ryndam, between local authorities for plaintiff and those of defendant; that he sent out an agreement for employment of the Ryndam in 1970; that it was not signed by plaintiffs,—but that by telegraphic and phonic communication, Tuinman insisted that a contract had been consummated; that he came to Utah to confer with plaintiff's officers re a dispute or misunderstanding as to the contract for 1970,—at plaintiff's request, so he says; that he was in Salt Lake a couple of days and another representative stayed longer.

Although these uncontradicted statements on the part of one of defendant's top officials seem rather persuasive in concluding that the defendant did business here under the letter and spirit of the Shoe case, the Zale case, and our Long Arm Statute, the following facts also should lend weight to a conclusion that there was a "doing business"

in Utah under the act that justified the local court's exercising jurisdiction without aborting the due process concept.

About two weeks *after* plaintiff filed this suit in Utah, defendant filed a suit in New York to collect damages for a breach of a contract executed by plaintiff,—which plaintiff here asserts to be unenforceable for one reason or another. It is difficult to understand how defendant can take the position that there *is* a contract, that under the facts recited above seem to have some basis for a conclusion that there were business dealings in Utah, but that everything, including the charter, profit, execution of the contract, etc., was accomplished outside of Utah. At any rate, comparing this case with the Shoe and Zale cases, we think the trial court erred,—particularly when its decision was bottomed at least on a statute[5] not cited in the brief and apparently not relied upon by either party as a matter for appeal here.

The record further reflects that Holland signed "Sub-Agency Appointment Agreements" with local travel agents wherein the agents agreed to comply with the company's instructions and the regulations of the Steamship Conference, of which defendant was a member, and in which comprehensive terms and conditions were incorporated relating to the sale of tickets, escrowing fares, etc., largely as testified to by Holland's Mr. Tuinman. It is conceded that each travel agent is not an exclusive agent for the steamship line and there is some kind of merit to a contention that there must be more contacts than just sales and sales promotions within the state by independent non-exclusive sales representatives, to constitute doing business. The contention would seem to beg the question, however, since

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[5] Title 16-10-102 (Laws of Utah 1963, ch. 19, sec. 8; Vol. 2, 1971 Pocket Supp., p. 263).

it is based on the assumption that such sales and promotion are the *only* contacts in the state,—but in the instant case and in the Shoe case and in the Zale case the "more contacts" *were* extant. These last mentioned contacts cannot be ignored, and the written agency contracts mentioned using the term "agent" time and again, and containing elements of control at least when sales were accomplished, making such "agents" trustees for defendant and keepers of the faith for the latter, certainly do not detract from the ultimate conclusion that they, supportive of other facts, are part and parcel of a bundle of facts which in the aggregate are not misnomered if called "doing business" in the statutory and constitutional connotations of that phrase.

The record reflects that after considerable talk at a March 1969 meeting in Utah where minutes were taken, with plaintiff's counsel present, concerning a charter party for the ship Ryndam in 1970, after one had been completed in 1969, and after considerable telephonic and telegraph communications between the parties,—plaintiff in Utah and defendant in New York,—defendant, in November 1969 sent a lengthy and detailed contract to plaintiff in Salt Lake City for signature. The record is not too clear as to why it was not signed, except as reflected in the complaint, but a $160,000 check was sent to defendant in connection with the negotiations for the 1970 charter party. The Utah meetings were characterized and emphasized in defendant's brief as being strictly social and sort of in between stops. Such characterization does not reconcile itself as an absolute, with the frank concessions of Mr. Tuinman that the meetings were social *and* business meetings, and that business was discussed at all of them, nor with the fact that after the proffered contract was forwarded to plaintiff, but

rejected without signature, Mr. Tuinman came to Salt Lake in January 1970 to discuss the differences.

We think that under the International Shoe case and the Zale case, the order quashing service of process was in error, and the case remanded for further proceedings,—and that there is no useful purpose in discussing any of the other authorities cited by the parties.

CALLISTER, *C.J.*, and TUCKETT, *J.*, concur.

CROCKETT, *Justice*: (dissenting).

I am unable to reach the same conclusions as to the facts, nor as to the application of law to them, as does the majority opinion. I do not see that there is any substantial disagreement among us as to the applicable principles of law: that foreign corporations are not subject to the jurisdiction of the courts of this State unless they have a "business presence" here. This requires the engaging in business or activities to the extent of "at least certain minimum contacts" therein. This is not satisfied by contacts which are merely irregular or sporadic, but there must be some carrying on of the business in a manner which is to some degree systematic and continuous, so that it can fairly be said that the corporation has a business presence in the state such that the maintenance of the suit and the compelling of a defense therein does not offend against traditional notions of fair play and substantial justice.[1] As the main opinion correctly points out, this entails "more contacts ... than sales and sales promotion within the state by independent nonexclusive sales representatives."

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[1] Footnote 3 of main opinion.

I am also in agreement with the statement of the main opinion that "these cases are strictly factual" and that they are to be determined by application of the law to the facts of the particular case. However, we should also keep in mind that our basic rule of appellate review requires us to accord to the trial court the prerogative of weighing the evidence and of drawing inferences therefrom, and upon that basis of determining the facts. It is the duty of this court to respect that prerogative: to look at the evidence and the inferences therefrom in the light favorable to sustaining the findings and judgment of the trial court, and not to the contrary for the purpose of overturning the findings and judgment as the main opinion impresses me as doing here.

On the basis of the pleadings, affidavits, answers to interrogatories, and a plenary hearing, the trial judge made his findings and ruling in the form of a memorandum decision, extensively treating its view of the facts and the law, and which includes the following statements:

> In the case at bar, the plaintiff relies upon two visits to Utah by agents of defendant as constituting the "significant minimal contacts" to give this court jurisdiction under the statute and the due process clause. One was on March 31, 1969, which was before the effective date of the long-arm statute in question, and the other in January, 1970, upon which occasion defendant's agents were requested to come to Utah by plaintiff's agents without disclosing to defendant's agents, and intentionally so, that the purpose of the requested visit was to advise defendant that plaintiff would not use the Ryndam [defendant's ship] in 1970.
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> The "activities" of the March 31, 1969, meeting were at most, one part of the negotiations between the parties, and even if the Boston sailings were discussed at that meeting, in order for me to find that "obligations" were incurred or that a "claim" arose therefrom, it would require me to first find that a contract exists which is what plaintiff . . . denies.
>
> It is therefore, my conclusion that the activities of the defendant in this state were not sufficient to meet minimal requirements of the due process clause and the defendant's motion to quash the service of summons should be granted.

The case of International Shoe v. Washington[2] is the landmark authority in this field. As indicated in the majority opinion, that decision was based on the fact that the company employed resident salesmen in the state of Washington who had authority to conduct business and engage in activities in behalf of the company. It should also be noted that the decision was an affirmance of such determination by the Washington court, whose prerogative it was to find the facts, and not a reversal thereof on appeal, as is being done here.

In the recent case of Hill v. Zale Corporation,[3] 25 Utah 2d 357, 482 P.2d 332, we stated that the question of whether a foreign corporation is "doing business" within the state to subject it to the jurisdiction of our courts is to be determined from consideration of all of the relevant circumstances. That opinion pointed out a number of significant activities of the Zale Stores organization in Utah which distinguish it from the instant case. The Utah stores,

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[2] Footnote 3 of main opinion.

[3] Footnote 3 of main opinion.

though separate corporations, all did business under the name of Zale Stores, similar to the parent Texas corporation. The officers and directors, and the actual policy-making management, were practically identical. This was also true of the holding out to the public in advertising and in doing business; and of vital importance, the Utah stores did not have individual bank accounts, but the money was deposited to the credit of the Zale-Texas Corporation which controlled and disbursed it.

By way of contrast to the Zale case, in the instant one there is a considerably different fact situation. The defendant Holland-America Line has no stores or offices in Utah by that name, or at all. It has no employees or personnel here. The only outlet or contact with the public is through the travel agencies who are authorized to book its services along with similar services for other transportation companies. None of them serve Holland-America exclusively, but all book other transportation services generally. Each agency has a subagency appointment by agreement with the secretary of the Trans-Atlantic Passenger Steamship Conference. It permits the agency to book travel for its members in conformity with certain terms and procedures as determined for the most part by the Conference. The individual travel services, such as defendant Holland-America, arrange for distribution of their own literature, reservation rates, acceptances of reservations, and commissions to the agencies. Neither the travel services generally, nor this defendant, maintain separate offices, directory listings, or employ their own sales agents. Defendant's evidence also is that instead of being constant and regular, it has been somewhat inconsistent and sporadic in its advertising and contacts with the travel agencies in Utah.

It seems to me that fairness requires that this court keep the balance of justice true by applying the law in the same manner when it is to the disfavor of our courts and the disadvantage of our citizens as when it is to the contrary. This requires us to compare our own adjudication in Conn v. Whitmore[4] where we denied jurisdiction to the state of Illinois. There a similar problem was involved, but with the facts reversed. The plaintiff Conn was a resident of Illinois. Invoking their "long-arm" statute, he had served defendant Whitmore, a resident of Utah, and had obtained a judgment for which he was seeking full faith and credit in our Utah court. Whitmore challenged the Illinois court's jurisdiction and sought to defend on the merits here. Plaintiff Conn had solicited business (sale of horses) by mail in Utah. Whitmore had sent an agent to Illinois to look over the horses; had sent part of the purchase price in the mail, and had sent his agent who paid the balance and took delivery of the horses in Illinois. It is my opinion that there was at least as much "contact" by Whitmore in doing business in Illinois in that case as there is of Holland-America Line doing business in Utah in this one. Yet we held that this did not constitute the "transaction of business" by Whitmore in Illinois to give it jurisdiction within the meaning of its "long-arm" statute.

Based upon what has been said above, I am unable to see any justification for overturning the findings of our trial court, and would sustain his ruling.

ELLETT, *J.*, concurs in the dissenting opinion of CROCKETT, *J.*

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[4] 9 Utah 2d 250, 342 P.2d 871 (1959).

APPENDIX C

NOTICE OF DENIAL OF PETITION FOR REHEARING

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

OFFICE OF THE CLERK

July 14, 1972

John S. Rogers, Esquire
Burlingham, Underwood, Wright & Lord
Attorneys at Law
25 Broadway
New York, New York 10004

No. 12445

FOREIGN STUDY LEAGUE, a Utah corporation,

Plaintiff and Appellant,

v.

HOLLAND-AMERICA LINE,

Defendant and Respondent.

This day Petition For Rehearing denied; case remitted to Salt Lake County.

L. M. CUMMINGS,
Clerk

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

THE UTAH "LONG-ARM" STATUTE

Title 78-27-22 *et seq.*, Utah Code Annotated, Laws of Utah 1969, Ch. 246, secs. 1-7.

78-27-22. *Jurisdiction over nonresidents—Purpose of act.*—It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.

The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

78-27-23. *Jurisdiction over nonresidents—Definitions.*—As used in this act:

(1) The words "any person" mean any individual, firm, company, association, or corporation.

(2) The words "transaction of business within this state" mean activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah.

78-27-24. *Jurisdiction over nonresidents—Acts submitting person to jurisdiction.*—Any person, notwithstanding

section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

(1) The transaction of any business within this state;

(2) Contracting to supply services or goods in this state;

(3) The causing of any injury within this state whether tortious or by breach of warranty;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) Contracting to insure any person, property or risk located within this state at the time of contracting.

(6) With respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim.

78-27-25. *Jurisdiction over nonresidents—Service of process.*—Service of process on any party outside the state may be made pursuant to the applicable provisions of Rule 4 of the Utah Rules of Civil Procedure.

Service of summons and of a copy of the complaint, if any, may also be made upon any person located without this state by any individual over 21 years of age, not a party to the action, with the same force and effect as though the summons had been personally served within this state. No order of court is required. An affidavit of the server shall be filed with the court stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether proper service has been made.

Nothing contained in this act shall be construed to limit or affect the right to serve process in any other manner provided by law.

78-27-26. *Jurisdiction over nonresidents—Only claims arising from enumerated acts may be asserted.*—Only claims arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this act.

78-27-27. *Jurisdiction over nonresidents—Default judgments.*—No default shall be entered until the expiration of at least thirty days after service. A default judgment rendered on service may be set aside only on a showing which would be timely and sufficient to set aside a default judgment rendered on personal service within this state.

78-27-28. *Jurisdiction over nonresidents—When may be exercised.*—Subject to the applicable statute of limitations, jurisdiction established under this act shall be exercised regardless of when the claim arose.